Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLACY WATSON HERRERA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *sua sponte* removal of the Chief Judge of the District Court from Petitioner's then-ongoing criminal jury trial by the Seventh Circuit Court of Appeals, and that court's order directing the District Court to install a substitute judge to complete the jury trial, violated Petitioner's Due Process rights and warrants prompt review by this Court to resolve the important federal question of whether a trial judge may ever be removed from a criminal jury trial, and the trial resumed before a substitute judge, without the defendant's consent.

Whether the grant of mandamus relief reversing the exclusion of evidence by the Chief Judge, when that discretionary ruling excluding evidence occurred after Petitioner was placed in jeopardy but before final verdict, represented an abuse of the writ in that the government obtained relief specifically withheld from it by the Congress in 18 U.S.C. § 3731, through a use of mandamus specifically disapproved by this Court in the relevant decision of *Will v. United States*, 389 U.S. 90 (1967).

Whether the Court of Appeals in this case departed so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

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PETITION FOR A WRIT OF CERTIORARI

Clacy Watson Herrera ("Petitioner") respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 614 F.3d 661 (7th Cir. 2010), and reprinted in the appendix to this petition ("Pet. App.") at 2a-13a. Additional relevant orders entered by the Court of Appeals are reprinted at 22a-28a. The relevant decision of the District Court, as reflected in the trial transcript, is reprinted at Pet. App. 25a-28a.

JURISDICTION

The Court of Appeals entered its judgment on July 27, 2010 and denied rehearing on July 30, 2010. Pet. App. 2a-13a, 22a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district nor shall any state deprive any

person of life, liberty, or property, without due process of law.

STATUTES INVOLVED

Title 18, Section 3731 of the United States Code provides in relevant part that in a criminal case, "[a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict. . . ." 18 U.S.C.A. § 3731.

Rule 25 of the Federal Rules of Criminal Procedure provides as follows: "Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record."

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner asks this Court to review two extraordinary actions taken by the Seventh Circuit Court of Appeals during Petitioner's criminal jury trial: Upon a government petition for writ of mandamus, the Court of Appeals (1) removed the trial's presiding District Court judge *sua sponte* and without exploration of Petitioner's Due Process rights against such a substitution without his consent; and (2) granted a writ of mandamus that

overruled an evidentiary ruling by the trial judge notwithstanding the federal statutory bar against the government's taking of interlocutory appeals of evidentiary rulings once the defendant is in jeopardy and before final verdict. 18 U.S.C. § 3731. In so doing, the Court of Appeals decided important questions of federal law that have not been, but should be, settled by this Court, and departed substantially from the accepted and usual course of judicial proceedings. The mandamus ruling also conflicts with a relevant decision of this Court. Accordingly, certiorari should be granted.

With respect to the summary removal of the trial judge, who is the Chief Judge of the District Court, Federal Rule of Criminal Procedure 25(a) provides a mechanism for judicial substitution in the case of the trial judge's death or disability upon the substitute judge's certification of her familiarity with the trial record. But in criminal cases, the constitutionality of Rule 25(a)'s application without the defendant's consent has not been settled by the federal courts, and at least one leading commentator has asserted that such an application of Rule 25(a), as invoked here by the Court of Appeals, is *not* constitutional. 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 392 (4th ed. 2009). Acting in what the Court of Appeals admitted was "unavoidable haste" in the context of the request for mandamus relief in the midst of Petitioner's ongoing criminal trial, the Court of Appeals did not explore the constitutional limitations upon its summary substitution of the trial judge. The decision illustrates the need for this Court to provide guidance to the federal judiciary concerning

the circumstances in which Rule 25(a) could be applied, if ever, to supplant mid-trial the judge before whom the trial began, without the defendant's consent. In addition, the Court of Appeals issued its order removing the Chief Judge with no recusal motion from the government and no opportunity for Petitioner or the Chief Judge (who formally requested an opportunity to be heard on the mandamus petition) to address the significant constitutional or procedural issues, departing significantly from the accepted and usual course of judicial proceedings and calling for an exercise of this Court's supervisory authority.

In granting a writ of mandamus commanding the District Court to admit evidence that the Chief Judge had excluded, the Court of Appeals permitted the government to make an end run around the federal statutory prohibition against interlocutory appeals of evidence rulings made during trial. *See* 18 U.S.C. § 3731. By granting mandamus after Petitioner's petit jury was sworn and seated, the Court of Appeals gave the government relief which the Congress had specifically withheld in enacting Section 3731. The unlawful mandamus litigation had a disruptive and ruinous effect on Petitioner's jury trial, demonstrating why interlocutory appellate litigation of evidence rulings should not be permitted as a matter of sound judicial policy, and are not permitted by Section 3731 as a matter of unambiguous law. Indeed, this Court has specifically held that mandamus may not be used as a route around Section 3731, even if the government is left without an appellate remedy to a ruling that

could make securing a conviction more difficult. *See Will v. United States*, 389 U.S. 90, 96-97 & n.5.

For the foregoing reasons, Petitioner respectfully requests that this Court grant the proposed writ of certiorari.

B. BACKGROUND

Defendant was extradited from Panama on June 24, 2009, to face trial on this December 2001 criminal indictment alleging his participation in a drug-smuggling conspiracy involving the concealment of liquefied cocaine in baby formula cans, among other alleged smuggling activities.

In late October 2009, one week before the then-scheduled trial, the government disclosed for the first time that it was prepared to offer an opinion of a fingerprint examiner that Petitioner's known prints matched two latent fingerprints found on a piece of drug packaging (later referred to as Government Exhibit Roberson Seizure 2 or the "Roberson Seizure Evidence") from a packet of heroin recovered from the body cavity of a courier named Latashua Roberson. The defense opposed the untimely disclosure of this form of evidence, and the Chief Judge granted an oral motion to exclude the evidence.

The government then took an interlocutory appeal of the Chief Judge's ruling, and as the jury trial had not yet begun, this interlocutory appeal was permitted by 18 U.S.C. § 3731. On March 3, 2010, the Court of Appeals reversed and held that exclusion was too harsh a remedy for a discovery

violation, as a continuance would permit the defense time to meet the evidence. *United States v. Watson Herrera*, 366 Fed. Appx. 674, 676-77 (7th Cir. 2010), Pet. App. 14a-18a. The issues on this appeal had nothing to do with the evidentiary foundation for admissibility of the Roberson Seizure Evidence, which the government had yet to offer at a trial that had not yet begun.

Within days of the Seventh Circuit's March 3 ruling, the defense mounted a challenge to the admissibility of the fingerprint opinion testimony under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). On May 18, 2010, the Chief Judge denied the motion, holding that *Daubert* did not preclude admission of the proposed fingerprint analysis opinion testimony.

Trial began on July 6, 2010, with the jury ultimately considering 14 counts alleging conspiracy, importation of cocaine and heroin into the United States from Panama, and exportation of cocaine and heroin from the United States to the United Kingdom. During jury selection, the jurors were told that the trial would last two or possibly three weeks.

One week after trial began, on July 13, 2010, the government obtained from the District Court a stay of the proceedings and filed the first of two mandamus petitions directed at the Chief Judge's rulings concerning the Roberson Seizure Evidence. The first mandamus petition noted that the Chief Judge had refused to admit the Roberson Seizure

Evidence on foundational grounds,[1] and the government further suggested that in so doing, the Chief Judge was deliberately subverting the Seventh Circuit's March 3, 2010, order that the fingerprint opinion testimony should not be excluded by reason of its untimely disclosure.

With the mandamus petition still pending, the parties appeared in court on July 15 so the jury could be temporarily discharged, and during a colloquy with counsel outside the jury's presence, the Chief Judge noted that not only had the government declined to call Henry Marche, a foundational witness identified through the Chief Judge's *voir dire* of a witness, but also that the Chief Judge was concerned about still more foundational issues arising from a chain-of-custody document indicating questions "which have never been explained or answered" about the weight of the drugs in the Roberson Seizure Evidence, and about "rebagging" of the drugs. Later that day, the Court of Appeals denied the mandamus petition without prejudice on the ground that the Chief Judge said he had yet to rule, Pet. App. 19a-21a, and trial resumed on July 19 with the government stating it was calling Marche to "address the concerns raised by Your Honor."

To attempt to explain the "rebagging," the government called an Immigration and Customs Enforcement agent named Krystle Intoe for a *voir dire* outside the jury's presence, but she had no firsthand knowledge of the handling of the evidence,

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[1] Importantly, the Chief Judge's rejection of the government's first attempt to admit the Roberson Seizure Evidence occurred in front of the jury.

or of whether the evidence was handled consistently with the agency's procedures. The prosecution then offered oral explanations by government counsel to explain that the increase in weight could have occurred as a result of "rebagging" because the chain-of-custody document itself indicated that as of 2010, the exhibit now weighed some 500 grams. In response to the Chief Judge's questions about how the weight increased, the prosecutor offered that "[i]t's new bags. Any time a bag is unsealed, you have to take that unsealed bag and put it in a new bag." But the Chief Judge noted that "that's not what happened here," because as the prosecutor admitted, there were no new bags in Government Exhibit Roberson Seizure 2. During this point in the discussion, the Chief Judge referred to how "packaging could have been introduced that contained the fingerprints of this guy [the defendant], introduced at the time it was rebagged, and I need to have somebody in here to testify about when it was rebagged and that that didn't occur." But moments later, after government counsel explained that the government did not have the defendant's known fingerprints until his extradition from Panama in 2009, and after defense counsel explained that the point was not that the defendant's fingerprint was planted in the bag, the Chief Judge quickly backed off the notion that the defendant's fingerprint was planted anywhere: "Well, and that was speculation on my part, and I am just trying to impress upon government counsel the need for precision here. I use that as a speculative possibility. But you [defense counsel] are absolutely right. This was rehandled -- and, frankly, there was

no concern about fingerprints at any point in time until, apparently, October of 2009."

Meanwhile, as the government told the Chief Judge that it was "trying to locate a witness in Dallas" to address the Chief Judge's concerns about rebagging and weights, one of the first signs appeared concerning the wear and tear on the jury. A prosecutor disclosed in open court that the court security officer had learned that the jury had apparently begun a "pool," or a collective betting game, "as to whether there was going to be court today."

After a brief resumption of the evidence, the government disclosed that the witness who had made the weight and rebagging notations on the chain-of-custody form was Lynette Prado, a witness who previously had testified and had been excused, and who since had left for a camping vacation in Colorado. The Chief Judge rejected out of hand a request by the government to have Prado testify over the telephone. In a further effort to persuade the Chief Judge that the 20-gram increase in the weight of the drugs in the Roberson Seizure Evidence was not significant, the prosecutor again referred to the exhibit's then-current weight of more than 500 grams (whereas the first reported weight was 330), prompting the Court to focus on whether the government had presented a witness with personal knowledge to explain the 20-gram weight increase, and the rebagging process. Importantly, the Chief Judge emphasized that the government had not presented a witness with personal knowledge of the weights or the rebagging in compliance with Federal

Rule of Evidence 602, whereupon the government said it would attempt to procure Prado the next day.

But the government reported on the morning of July 22 that Prado could not be procured from her Colorado vacation, and then offered the Roberson Seizure Evidence into evidence again, without additional foundation. The defense objected that "what the Court has described, and what the defense believes the Court has described accurately, is a substantial question and a substantial problem that bears upon the possible tampering with the exhibit, given the difference in weights, given the comment that there is re-bagging going on." The defense made no mention of any planted fingerprint -- instead, the defense noted the simple fact, as identified by the Chief Judge, that the bag had started out at 330 grams and had grown to 350 grams during a single "rebagging" in 2001 (subsequent entries increased to more than 500 grams as late as 2010) that was never explained.

The Chief Judge then ruled on the admissibility of the Roberson Seizure Evidence, and again he made no mention of the theory of a planted fingerprint; instead he acknowledged that the government need not exclude all possibilities of tampering with evidence in order to establish a sufficient chain of custody. Pet. App. 25a-28a. He went on to find that although he was crediting (over the defense's objection) the government witnesses who testified, he was concerned about the possibility of tampering with Government Exhibit Roberson Seizure 2. He noted that the government had failed to recall Prado to explain why the drug weight

increased by 20 grams, and said, "in the absence of any further evidence, I cannot say there is a reasonable probability that the evidence has not been altered when, in fact, the document shows the evidence has been altered." Pet. App. 25a-28a. The Chief Judge excluded the evidence.

The government then obtained its second stay of the trial to allow filing of a second mandamus petition to challenge the Chief Judge's exclusion of the Roberson Seizure Evidence. It was July 21, or about two weeks since the start of trial. At this second interruption in the trial, the jury began to make clear that the additional demands of the prolonged trial were pushing some jurors past the limits of their ability to serve. Notes from three indicated that at least those jurors had serious employment- and life-related issues which were now threatening their ability to serve further. One juror broke down in tears, and another told the Chief Judge:

> I mean, we've gone through on numerous delays where we've only heard testimony for maybe 20 minutes at a day's time, and now we're telling – we're being told that the trial is going to continue and it should be no problem to continue with the trial. I can't rest my, you know, livelihood on whether or not I'm going to be called on Monday or I'm going to be called on Friday, when I've got clients and I've got potential business calling me, asking me when I'm going to be available.

After the government filed its second mandamus petition on July 26, the Chief Judge filed a written request to be heard in the Court of Appeals, and stated that the government had not accurately portrayed the record upon which it was seeking mandamus. But at 4 p.m. on July 27, without hearing more from the Chief Judge and without taking any briefing from Petitioner, the Court of Appeals issued an order granting the mandamus, removing the Chief Judge from the trial, and stating that an opinion would follow. Pet. App. 22a. Petitioner filed a rehearing petition less than an hour later before the Court of Appeals closed for the day, and then a longer, amended rehearing petition the following morning. The Court of Appeals entered its opinion on July 30. Pet. App. 2a-13a. In the opinion, the Court of Appeals said it had ruled in "unavoidable haste" because the defense had filed a mistrial motion, notwithstanding the court's pending stay of the matter. Pet. App. 4a. The Court of Appeals then explained that it was granting the mandamus petition and removing the Chief Judge from the case based on his "unreasonable fury" as demonstrated by several harsh comments he made to the government prosecutors, and his mention of the possibility that Petitioner's fingerprint was planted on the Roberson Seizure Evidence. Pet. App. 12a. The Court of Appeals further explained that its removal of the Chief Judge was justified under 28 U.S.C. § 455(a). The opinion also held that Federal Rule of Criminal Procedure 25(a) included disability by reason of recusal. The Court of Appeals did not discuss the question of whether the substitution of

judge could be constitutional absent Petitioner's consent.

When trial resumed on Monday, August 2 before a substitute District Court judge who certified her familiarity with the record, 12 jurors and no alternates remained. With its first witness on the stand since the second interruption of the trial, but without offering any new foundational testimony and in apparent reliance on the mandamus ruling, the government promptly offered Government Exhibit Roberson Seizure 2 into evidence before the jury, and in the substitute judge's first ruling before the jury, the exhibit was admitted over the defense objections.

Meanwhile, the jury was even closer to running out of time to hear the case. One juror already had told the District Court in a note that she was scheduled to leave for vacation on Thursday, August 5. The next day, August 3, saw only 11 jurors arrive for court, as one juror who earlier had broken down in tears in court over her continued service reported to the court that she had been unable to secure child care for her sick child. In consultation with the court, the parties decided to agree that the District Court should release the 11 jurors for the day and order them to return on August 4, in the hope that the then-absent 12th juror would return. The defense continued to object to the time pressure the jury was facing, including as a result of the impending vacation, stating: "The other consequence of that [delaying the trial from August 3 to August 4 for the then-absent juror] is we wind up with [the soon-to-be-vacationing juror] and possibly other jurors having an external influence on their

deliberations and the time needed to deliberate about this case." The substitute District Court judge indicated that she shared the defense's concern: "[T]heir schedules and their lives and their need to get back to work or their families or whatever it might be. I mean, [the then-absent juror]'s situation is the most compelling one, but we know every one of these jurors has issues with the time. That's my concern . . . . I think there has been an indication that at some point or another, their time runs out."

Then, after the court ordered the 11 jurors on August 3 to return the following morning, August 4, so the trial could resume, a juror asked what might happen if the then-absent juror did not show up. Without halting the proceedings or soliciting input from the parties as to how to answer that question, the District Court immediately responded by stating the following:

> Without 12 jurors, we can't proceed. You know, that's the rules from the time of -- that trials began. We need 12 jurors. That's why -- otherwise I would go ahead with whoever we have got. Grand juries are different. They have what's called a quorum for a grand jury. But for a petit jury, what you are sitting on, it's got to be 12 . . . . But we are down to 12, and we have to have everybody in order to proceed.

The District Court's contemporaneous response to the juror's question would cast a cloud over the later guilty verdict on 8 of the 14 counts.

After 11 jurors were told on Tuesday, August 3 that "we have to have everybody" but knew that they would have "everybody" only through Wednesday, August 4, because one juror's vacation would begin "even already Thursday [August 5]," as the court had stated before the jury, the jury returned on Wednesday, August 4, as a jury of 12 and heard evidence, argument, and instruction. At 3:48 p.m. on August 4, the 12-person jury began deliberating. After being told by the District Court that it could set its own schedule, the jury returned its verdict at 10:30 p.m. on August 4.

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT'S SUMMARY REMOVAL OF THE CHIEF JUDGE VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND WARRANTS REVIEW BY THIS COURT.

The Court of Appeals considered the propriety of its *sua sponte* substitution of judge in a criminal case, and in the midst of the jury trial itself, in one paragraph of its opinion, stating only that "disability" under Rule 25(a) included recusal. Pet. App. 24a, citing *United States v. Sartori*, 730 F.2d 973, 967 (4th Cir. 1984). The Court of Appeals did not address the important federal question of whether such a substitution can be constitutional without the defendant's consent. Neither this Court nor the lower federal courts have definitively answered that question. This Court should answer it by holding that stripping a criminal defendant of his trial judge once jeopardy attaches in a jury trial

violates fundamental conceptions of Sixth Amendment due process at trial.

A criminal defendant's rights under the Due Process Clause of the Sixth Amendment stem from the fundamental right to a trial before an impartial jury. This Court has viewed Sixth Amendment due process at trial to have among its essential elements a right to have the trial in the presence and under the supervision of a judge having the power to instruct the jury as to the law "and advise them in respect to the facts . . . . [and] to set aside their verdict, if, in his opinion , it is against the law or the evidence." *Patton v. United States*, 281 U.S. 276, 288 (1930) (*rev'd on other grounds by Williams v. Florida*, 399 U.S. 78 (1970)). In the context of the Double Jeopardy Clause, this Court has spoken of the defendant's "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689 (1949), and of jeopardy attaching "once defendant is put to trial before the trier of the facts, whether the trier be a jury or judge." *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Although the federal courts have never definitively settled the constitutional question of whether a substitution of judge in a criminal jury trial may constitutionally occur over the defense objection, a number of courts have pointed out that the precise question of substitution without the defendant's consent was not presented. Among these decisions is *Sartori*, upon which the Court of Appeals relied for the proposition that Rule 25(a) authorized the substitution of the Chief Judge in this case. As the Fourth Circuit noted in *Sartori*, the defendant in

that case made no objection to the substitution of judge. 730 F.2d at 967 n.1; *see also United States v. Lynch*, 598 F.2d 132, 135 n.7 (D.C. Cir. 1978) ("Since all defendants were willing to accept such a substitution, we need not decide whether the Constitution permits such assignment when defendant does not consent."), citing C. Wright, *Federal Practice and Procedure* § 392 (1969).

The Wright treatise is the leading authority to address the unconstitutionality of the forced substitution of a criminal defendant's trial judge in the midst of a trial. Wright noted that this Court "commented adversely on a draft [of Rule 25] that apparently would have permitted substitution during trial, asking if it had been considered whether such a rule were constitutional and in any event whether as a matter of policy it should be permitted." 2 Wright & Henning, *supra*, § 392, citing Lester B. Orfield, *Disability of the Judge in Federal Criminal Procedure*, 6 St. Louis U.L.J. 150, 151 (1960). Wright concluded that such a substitution without consent is not constitutional in a criminal case, discussing *Freeman v. United States*, 227 F. 732, 759 (2d Cir. 1915), an older case in which the Second Circuit held that substitution of a judge may not take place in a criminal trial even with the defendant's consent. In *Freeman*, the Second Circuit considered a criminal trial to consist of "at least one judge and 12 jurors, all of whom must remain identical from the beginning to the end." 277 F. at 759.

The Wright treatise states, in 2009: "The reasoning of the Second Circuit still has vitality if

defendant does not consent. In the absence of consent, it would seem that Rule 25(a) cannot be validly applied, and that the death or disability of the judge requires that a mistrial by granted." 2 Wright & Henning, *supra*, § 392. In *Whalen v. Ford Motor Co.*, 684 F.2d 272, 274 (4th Cir. 1982), the court further cited Section 392 of the Wright treatise with approval in reversing a civil jury verdict reached after a mid-trial substitution of judge over one party's objection. The court further noted that the scenario of recusal without a defendant's consent in a criminal case under Rule 25(a) was a "possibly thorny question" not presented. *Id.* State courts also have recognized the issue. *See, e.g. Bailey v. State*, 397 N.E.2d 1024, 1027 (Ind. App. 1979) ("where the defendant does not waive his right to trial before the same judge, a mistrial must be declared if the original judge is unable to continue after the trial has begun but before the verdict is returned or the findings or decision of the court is filed"); *State v. Davis*, 564 S.W.2d 876, 878-79 (Mo. 1978) (citing Wright treatise as support for holding that Missouri courts would not adopt a rule of practice comparable to an interpretation of Rule 25(a) permitting substitution of a defendant's trial judge without consent, and citing cases of older vintage); *People v. McPherson*, 74 Hun. 336, 26 N.Y. Supp. 236 (1893) ("The proposition that a criminal case cannot be partly tried before one magistrate and partly before another seems to me too clear to need argument or citation of authority to sustain it. When the trial of a case is once commenced, it must proceed to the end before the same court and jury").

Even cases holding that the mid-trial substitution of a judge is permissible acknowledge that the issue is one of constitutional dimension. *See, e.g., Commonwealth v. Carter*, 669 N.E.2d 203, 205 (Mass. 1996); *United States v. LaSorsa*, 480 F.2d 522, 530 (2nd Cir. 1973). In *Carter*, the Massachusetts Supreme Court held that a mid-trial substitution of the hospitalized trial judge did not violate the defendant's right to a trial by jury where the new judge complied with the requirements of Massachusetts' analog to Federal Rule of Criminal Procedure 25. 669 N.E.2d at 205 n.1, 208. Although *Carter* reasoned that prior cases disapproving of substituting a judge mid-trial were "generally entangled with outdated conceptions of the right to trial by jury," *id.* at 206, *Carter* also acknowledged that "when the judge is the finder of fact, as in . . . . prerequisites to admissibility (*e.g.*, authentication of exhibits . . . .) the judge is cast directly in the role of deciding credibility issues," and expressly declined to decide "whether a substitute judge may act as factfinder after hearing only a portion of the relevant testimony firsthand." *Id.* at 206 n.5.

In *LaSorsa*, the Second Circuit held that the defendant's right to a jury trial was not infringed where the substitute judge began presiding over the trial after the jury had already begun deliberations, the judge simply read back portions of the transcript at the jury's request and took the jury's verdict, and the defendant did not object to the substitution. 480 F.2d 522, 530-31. *LaSorsa* held that absent a showing of substantial prejudice due to the substitution, a mid-trial substitution of judge is not unconstitutional *per se*. *Id.* at 531. Similar to the

Carter court, the Second Circuit rejected the defendant's reliance on its earlier decision in *Freeman*, as based on a subsequently repudiated principle that the defendant could not waive his right to a jury trial. *LaSorsa*, 480 F.2d at 531. Here, an ample basis exists to consider whether the substitution of judge prejudiced the Petitioner, on multiple levels.

First, the jury saw the Chief Judge rule against the government on a piece of evidence that it was able to admit into evidence immediately upon entry of the substitute judge into the case. The substitution also followed remarks the Chief Judge made to the government, some in the jury's presence, suggesting adversity between the Chief Judge and the government. This creates a very substantial risk that the jury believed that the government was correct, and that the judge was being punished for siding with the defense. This message is a very bad one to send in a jury trial.

Second, the substitution deprived Petitioner, during litigation of Rule 29 (denied) directed verdict and Rule 33 (not yet decided) new trial motions, of the judge who had actually heard the government's evidence, much of which consisted of cooperating witnesses whose testimony the jury was instructed to consider with caution and great care. This case differs significantly from *LaSorsa*, in which the substitution took place after deliberations began. In *United States v. Cameron*, 953 F.2d 240, 245 (6th Cir. 1992), the court noted the difference, for purposes of evaluating impact of a substitution of judge in a criminal case after the start of trial,

between a substitution after only one day of trial and one occurring after the conclusion of a four-day government case-in-chief. This case also underscores the concern mentioned by *Carter* about the harm to the defendant when the substitute judge is called upon to find facts. This Court should review the decision below and provide guidance to the lower federal courts in the form of an answer to the question addressed by Professor Wright: Whether a trial judge may ever be recused without the defendant's consent without necessitating a mistrial.

The removal of the Chief Judge also departed from the accepted and usual course of judicial proceedings. By imposing its recusal of the Chief Judge *sua sponte*, and without the opportunity for briefing (other than the Petitioner's hurriedly filed rehearing petition immediately after the order recusing the Chief Judge), the Court of Appeals relied almost entirely on one litigant's characterization of the judge's conduct, even as the Chief Judge asked for an opportunity to explain his view that the government had mischaracterized the record. The Court of Appeals declined to offer him that opportunity, apparently as a result of the haste associated with the jury having been on the second of two hiatuses. But, for the reasons above, the summary recusal of the trial judge in the midst of a criminal jury trial was not an issue to be resolved in haste and without proper briefing. Although various interpretations of Federal Rule of Appellate Procedure 21 called for the defense and/or the trial judge in a mandamus proceeding to be heard, the Court of Appeals disposed of that requirement by citing Federal Rule of Appellate Procedure 2, a broad

general provision allowing an appeals court to suspend the appellate rules for "good cause." Pet. App. 6a.

The Court of Appeals summarily concluded that "good cause there was," *id.*, but its unsatisfactory rationales for the removal of the Chief Judge suggest that appropriate briefing would have led to a more careful judicial consideration of whether to remove the Chief Judge. In the brief order the Court of Appeals entered on July 27, Pet. App. 22a, the Court of Appeals cited its own Rule 36 as authority. But after Petitioner challenged Rule 36's applicability in his rehearing petition, the Court of Appeals made no mention of it. Instead, the court invoked 28 U.S.C. § 455(a) to conclude that recusal was justified amid "a significant risk that the judge will resolve the case on a basis other than the merits," citing the Chief Judge's purported "unreasonable fury" toward the prosecutors. Pet. App. 12a. But Section 455(a) provides a mechanism in which a judge whose impartiality may reasonably be questioned "shall disqualify himself." 28 U.S.C. § 455(a). Commonly the judge's decision of whether to disqualify himself comes after one of the parties, or the court itself, makes a motion for recusal under Section 455(a). For example, in a case relied upon by the Court of Appeals, *In re United States*, 572 F.3d 301, 308 (7th Cir. 2009), the court stated that when the appellate court receives the mandamus petition well after the District Court has denied a motion to reconsider his recusal under Section 455(a), the procedure "gives the district court adequate time to reflect on its order and, if necessary, correct its own error before another court becomes involved."

Here, there was no such motion, and no opportunity for the District Court or any of the litigants to consider recusal in the first instance. Moreover, in the very same *In re United States* decision relied on by the Court of Appeals as authority for the recusal under Section 455(a), *see* Pet. App. 12a, the court referred to a proposition "well-established in this circuit," i.e., "*that a motion for recusal under section 455(a) must be made before trial . . . .*" *In re United States*, 572 F.3d at 309 (emphasis added). The application of Section 455(a) in Petitioner's matter thus conflicted with the court's own recent precedent. In addition, the Court of Appeals issued a supplemental order on July 28 instructing the District Court on remand to proceed under Rule 25(a) of the Federal Rules of Criminal Procedure, *see* Pet. App. 24a, but neither the order nor the July 30 opinion discussed or considered Professor Wright's position that the rule cannot be applied constitutionally without a defendant's consent.

Moreover, the Court of Appeals (and the government) cast the Chief Judge's comments in the worst possible light, whereas "judicial remarks during the course of a trial that are critical or disapproving or, or even hostile, to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). While the Chief Judge made undisputably harsh comments to the government during the trial, those comments, notably, did not prompt the government to file any

motion for his recusal on grounds of bias or partiality.

More importantly, the Chief Judge's ruling on the Roberson Seizure Evidence was carefully considered and followed an extensive effort by the government, aided by the Chief Judge's suggestions and even his own *voir dire* examinations of witnesses, to repair the holes in the exhibit's chain of custody. It was the Chief Judge who identified Marche as the witness who could testify concerning the practices of the deceased DEA chemist who had handled the evidence. It was in response to the Chief Judge's questions that the government admitted that it had not presented a witness with personal knowledge of the weight and rebagging issues and thus would need to recall (with the Court's assent but over the Petitioner's objection) witness Lynette Prado. Indeed, the Chief Judge could have exercised his discretion to exclude the fingerprint opinion testimony under *Daubert* in May but declined to do so. The actual record was far more nuanced than the mandamus petition made plain. Thus, the Court of Appeals should have given the Chief Judge and the Petitioner a more substantial opportunity to place the judge's comments -- and his rulings -- in their proper context.

In sum, the *sua sponte* removal of the Chief Judge from the Petitioner's ongoing criminal jury trial without his consent presents this Court with an opportunity to settle the important federal question of whether such an action could ever be constitutional. The Court of Appeals' action also was outside the accepted and usual course of judicial

proceedings, and this Court should exercise its supervisory authority to hold that the Court of Appeals should not have taken such drastic action without a searching analysis of the record, the law, and the submission of all parties -- not just the government's mandamus petition.

B. THE SEVENTH CIRCUIT'S GRANT OF MANDAMUS TO REVIEW A TRIAL COURT'S EVIDENTIARY RULING AFTER THE START OF TRIAL VIOLATED THE CRIMINAL APPEALS ACT AND REPRESENTED AN ABUSE OF THE WRIT.

The Court of Appeals should not have entertained the government's two mandamus petitions. It erred by granting the second and compelling the District Court to admit evidence that the Chief Judge had excluded in a ruling made after Petitioner was placed in jeopardy and before final verdict. Congress specifically excluded such rulings from the scope of permissible government interlocutory appeals under the Criminal Appeals Act, 18 U.S.C. § 3731. The Court of Appeals thus permitted the writ of mandamus to be used as a means of circumventing Section 3731's bar against such appeals.

The conclusion by the Court of Appeals that mandamus relief was warranted because the government could not obtain appellate relief if the Petitioner were acquitted is in direct in conflict with this Court's most relevant decision on the subject. *In Will*, this Court held that the government's inability to appeal the trial court's ruling sought to be

reversed on mandamus review, even if that ruling resulted in dismissal of the government's criminal case, is "irrelevant" because "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it [the government] would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions." 389 U.S. at 96-97 & n.5 Thus the Seventh Circuit's having rested mandamus on the unavailability of "other mechanisms of review," or upon the idea that mandamus is "typically directed at nonappealable orders," Pet. App. 7a, conflicts with this Court's holding in *Will* that criminal cases are fundamentally different when it comes to mandamus. *Will*, 389 U.S. at 96-98.

This Court has specifically stated that it "cannot and will not grant the Government a right of review which Congress has chosen to withhold," and that [m]andamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies [disfavoring piecemeal appeals in criminal cases]." *Id.* at 96-97 & n.5. The Court of Appeals opinion failed to account for the distinct treatment required of mandamus petitions in criminal cases and inexplicably did not cite or discuss the decision in *Will* at all. The grant of mandamus in this matter simply cannot be squared with *Will*.

In the Chief Judge's discretionary evidentiary ruling, the Chief Judge carefully weighed the evidence presented by the government on the foundational questions surrounding admissibility of the Roberson Seizure Evidence, and he credited each

of the witnesses presented by the government. The government's problem was simply that it provided no adequate witness to explain how the drugs in the exhibit grew in weight during any "rebagging" process. Pet. App. 25a-28a. In reality, the government presented witnesses who either did not testify about the "rebagging" (Marche) or whose testimony on the "rebagging" was without personal knowledge (Intoe, who did not even testify before the jury).

The Chief Judge did not base his ruling on his earlier "speculative" comment about the planting of a fingerprint. The Seventh Circuit's focus on that comment therefore was error. The Court of Appeals also erred by focusing on the explanation offered through oral statements by the prosecutor (about the exhibit increasing in weight to some 500 grams over time because of the adding of more bags, notwithstanding that substantial new bags were *not* added). Indeed, the state of the record left the Chief Judge with an ample basis to rule reasonably and soundly that the evidence should not be admitted.

A ruling by the District Court is not mandamusable simply because an appeals court might disagree with the ruling. This Court in *Will* was clear in stating that a nonappealable order does not become mandamusable simply because a reviewing court believes the order was erroneous. To suggest otherwise, this Court has said, would be to suggest that entering an erroneous order is somehow beyond a court's ordinary "power," and that would be a "semantic fallacy." 389 U.S. at 99 n.6. "Courts faced with peremptory writs must be careful lest

they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Id.*

The Court of Appeals erroneously described the Chief Judge's ruling as "so patently unsound as to exceed the legitimate bounds of judicial power," justifying mandamus. Pet. App. 5a. In fact, as noted above, the Chief Judge's ruling had a solid basis in the record: The government did not produce a witness with personal knowledge of how the drugs grew in weight. The judge's comments did not suggest that the judge was so antagonistic as to have exceeded his legitimate power in excluding the evidence. In fact, the Chief Judge actively aided the government in steering the government toward a foundational record he might find satisfactory, and the judge rejected Petitioner's challenge to the fingerprint evidence under *Daubert*. Again, the manner in which the Seventh Circuit decided the mandamus petitions without hearing sufficiently from the Petitioner or the Chief Judge contributed to the one-sided prism through which the Seventh Circuit viewed the record here. The "unavoidable haste" in which the Seventh Circuit said it acted was avoidable -- it could have dismissed the petitions out of hand. Under the law, it should have.

By entertaining the petitions, the Seventh Circuit opened the door to the many problems that Congress designed Section 3731 to avoid in criminal trials. Predictably, those problems arose here. When Petitioner and his counsel should have been continuing to prepare for the ongoing trial, they were

preparing to litigate mandamus proceedings in the Court of Appeals. The mandamus petitions imposed added delays and costs associated with appellate litigation in the middle of a trial at which Petitioner rightfully expected a speedy resolution to the charges against him. Ultimately, the government's repeated mid-trial trips to the Court of Appeals placed an immense strain on the jurors, who saw the trial delayed -- and who were sent home -- twice, so that the trial was extended well past the jurors' reasonable expectations. In *Lynch*, the District of Columbia Circuit expressed concern about interruption of the jury's focus during a two-week lapse in the trial, and about the extension of the trial past the time when the jurors expected it to end. 598 F.2d at 135. The latter concern, the court said, "raised the additional problem that the jury might be subject to pressure resulting from a desire to decide the case expeditiously." *Id.*

Importantly here, the two stays of the trial, and the delays associated with them, appear to have run out the jury's clock, in that an incident at the end of the trial rendered the resulting verdict constitutionally invalid On August 3, the jurors were told that all 12 needed to be present to proceed, at a time when there is reason to believe that the jurors knew that very shortly, on August 5 (the day after the verdict was returned at 10:30 p.m.), their number would dwindle to 11 because of a juror's planned vacation. Petitioner thus was deprived of a fair trial by operation and consequence of the mandamus petitions.

Accordingly, the manner in which the Court of Appeals entertained and eventually granted mandamus presents not only an important federal law question that this Court should settle under the precepts of *Will*, but also represents a departure from the accepted and usual course of judicial proceedings warranting an exercise of this Court's supervisory authority. As this Court stated in *Will*, issuing a writ of mandamus in a criminal case has "wide implications" for the orderly administration of justice in the federal courts, 389 U.S. at 95, and this particular writ issued in derogation of Section 3731 presents a question clearly warranting review on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted so that this Court may consider whether to set aside the jury's verdict and order a new trial.

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Respectfully submitted,

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